IN THE SUPREME COURT
OF FLORIDA

THE FLORIDA BAR,
Complainant,
vs.
F. LEE BAILEY,
Respondent.
_____/

CASE NO. SC 96,767
T.F.B. Number
1996-51,085(15B)
1997-50,110(15A)

F. LEE BAILEY'S MOTION FOR LEAVE TO SUPPLEMENT THE RECORD WITH THE TRANSCRIPT OF THE TESTIMONY IN THE UNITED STATES COURT OF FEDERAL CLAIMS IN *F. LEE BAILEY V. UNITED STATES*, AND TO FILE, WITHIN 20 DAYS OF THE ORDER GRANTING THIS MOTION, A SUPPLEMENTAL BRIEF OF NO MORE THAN 20 PAGES, IDENTIFYING TESTIMONY IN THAT PROCEEDING THAT IS RELEVANT TO THE FACTUAL ISSUES IN THIS CASE

Oral argument was held in this case on August 30, 2001. At the argument, some members of the Court inquired about the status of the recently concluded (August 2, 2001) proceedings in the United States Court of Federal Claims case styled *F. Lee Bailey v. United States*, Case No. 96-666c. That case is a breach of contract case brought by Mr. Bailey against the United States, and the same facts are in issue in that case as in this case: what were the circumstances under which the Biochem Pharma stock was transferred to Mr. Bailey and was that transfer "in trust."

Those issues are at the heart of the case brought by the Florida Bar against Mr. Bailey. Because United States

Court of Federal Claims Judge Marian Horn will be rendering an opinion based on the same facts which form the foundation of the Bar proceeding and because the transcript in the Court of Claims contains the fully developed testimony of important federal government witnesses who were unavailable to Mr. Bailey in the Bar proceeding, this Court should be apprised of that testimony before deciding the instant case. Given the harsh sanction sought by the Bar, and the high substantive evidentiary standard by which the evidence is to be judged (clear and convincing evidence), due process of law supports this request to supplement the record with the transcripts of the United States Court of Federal Claims proceeding.

Two examples of the importance of this Court being fully informed of the Court of Federal Claims testimony are the comments by Judge Horn at the conclusion of the evidence in that case, and the testimony of Thomas Kirwin, the Assistant United States Attorney who maintained the only notes about the May 17, 1994 proceeding before Judge Paul.

Judge Horn spoke of the "inconsistencies" in the testimony [Exhibit A, August 2, 2001 Transcript Excerpt, p. 1802); the fact that "no other proceeding and no other presiding official has had the opportunity that I've had here to explore this issue as fully as I've had. . . . " (*id.* at 1808); and that "assess[ing] the credibility of witnesses" presented "real issues" (*id.* at 1811-12). In that regard, she said:

> I found the only person who testified with any lawyer-like demeanor was Mr. Bailey.

> That doesn't mean he's got a winner here, but it was remarkable how each of the other key major criminal practitioners who got up here, and I'm talking about the private practitioners now and some of the public ones too . . . used phrases, used passion, got pretty agitated as they were testifying.

Exhibit A, p. 1812. She continued, that "[t]he witnesses stack up in different ways, depending on which side you're on." *Id.* at 1817. One witness she singled out was Thomas Kirwin, who testified as Mr. Bailey's witness:

> I found Mr. Kirwin, of all of the Assistant U.S. Attorneys, to be the most credible, which makes him a vital player in this multi-action play. He was not comfortable on the stand, but I felt that he was trying to be forthright and trying to be honest about what he said. He didn't like where he was. You could see that. He was not enjoying this opportunity to testify, but he appeared to me to be very, very straightforward.

Exhibit A, p. 1818.

Mr. Kirwin testified, *inter alia*, about the transfers of the Biochem Pharma stock:

> Q. – there's no reference to trust in that document or trustee; is that correct?
>
> A. That's correct.
>
> Q. Was there any discussion when that document was drafted that the term trust should be included, in that document, 1-5?
>
> A. The Biochem Pharma. No, I don't remember any discussion about inclusion of the term trustee in that document.

Exhibit B, Transcript Excerpt, pp, 524-25.[1] Nor did Mr. Kirwin "remember hearing the word trust," "I don't remember the word trust being used" at the in-chambers

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[1] At the August 30, 2001 oral argument, a member of this Court asked why the government "would allow a transaction to go down like this without more express agreements in writing or evidence of what the actual transaction was," and Bar counsel's answer was: "I think the best explanation, it was purposeful. I think all of the parties did not want to have a paper trail." Mr. Kirwin's answer was much different:

> A. The question of whether or not something should be written was not raised. It wasn't like it said "oh, no, let's not put anything in writing." The issue of whether or not anything should be in writing was just never raised by anybody, other than you know, we talked about the plea agreement and that would be, you know, a written document. But you know, in terms of writing down what Mr. Bailey could and couldn't do, should and shouldn't do, what the United States Government could and couldn't do and should and shouldn't do, that issue never came up.

Exhibit B, pp. 526-27. The dichotomy of views between Bar counsel's response and the above quoted testimony is another example of why the Court should have *all* the testimony prior to decision making, as is the Court of Claims testimony of AUSA Gregory Miller, who said "if the stock became valueless, he [Bailey] would have no other pool to get his fees from" and "I did make it clear to him that was the only stock at that time, the only funds we were making available for paying his fees" (Exhibit C, pp. 1625-1626), which leaves no doubt that the stock incorporated a fee. Indeed, Miller testified that had Bailey taken the "cash option [of "up to $6 million" (p. 1570)] that was on the table in front of him he had absolutely no risk . . . they would have the money for the fees, the attorney's fees and have it for upkeeping the property." *Id.*, at 1627.

conference with Judge Paul on May 17, 1994, nor did his notes reflect any "trust" mentioned to Judge Paul. Exhibit B, pp. 590-95, 607. Asked whether Mr. Bailey "was restricted in the timing of his selling the stock," Mr. Kirwin said:

> A. My understanding was whatever Mr. Bailey needed to do with the stock; he could do with the stock. And always the capstone on that, and maybe that's why I'm thinking at the end of this thing, Mr. Bailey's going to have to account for what he did to Judge Paul, and you know, God bless him for having to do that.

Exhibit B, pp. 620-21, Whether Mr. Bailey is to be blessed or blamed depends on how one views *all* the evidence under the clear and convincing evidence standard.

CONCLUSION

It is respectfully submitted that these brief examples underscore the importance of this Court having the benefit of the testimony in *F. Lee Bailey v. United States*. The Referee in the Bar proceeding called Mr. Bailey a liar. *See*, Amended Report of Referee, July 24, 2000, p. 23. That condemnation directly preceded the Referee's closing remark: "Frankly, it is difficult for this Referee to conceive of a more egregious set of circumstances than those which Mr. Bailey has brought upon himself." *Id.*, p. 24. Those are harsh words, but they are not the only view of Mr. Bailey.

The United States Court of Federal Claims Judge had a different view of Mr. Bailey, and Mr. Kirwin, whose

testimony was advanced by Mr. Bailey as his witness, was deemed credible too. We will not know the outcome of the Court of Claims case for several months, but consistent with the caution which should be exercised in these serious proceedings, it would be prudent and fair for the Court to have complete testimony regarding the government's and Bailey's understanding of the "unprecedented arrangement" which is the crux of this case. *See*, Exhibit A, p. 1816.

If the Court grants this Motion to Supplement the Record, F. Lee Bailey requests that he be permitted to file, within 20 days, a Supplemental Brief limited to 20 pages to identify the relevance of the supplemented record to the instant proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing (including the transcript served on Ms. Davis only) was forwarded by *FedEx* to the following counsel of record this 12th day of September, 2001:

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